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In the Supreme Court of the United States

OCTOBER TERM, 1985

KAISER ALUMINUM & CHEMICAL CORPORATION AND KAISER ALUMINUM & CHEMICAL SALES, INC., PETITIONERS

v.

JOSEPH A. BONJORNO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the evidence adduced at trial was sufficient to establish that petitioners engaged in a "price squeeze" violative of Section 2 of the Sherman Act, 15 U.S.C. 2.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Respondents are the successors in interest to the Columbia Metal Culvert Company, Inc. (Columbia), a now-defunct company that fabricated aluminum culvert pipe during the time period relevant in this case.[1] Petitioner Kaiser Aluminum & Chemical Corporation (Kaiser) is a major manufacturer of aluminum, including the aluminum coil that is the raw material used in fabricating aluminum culvert.[2] At the time of the events at issue here, Kaiser sold aluminum coil to independent fabricators such as Columbia through Kaiser Aluminum & Chemical Sales, Inc., a wholly-owned subsidiary. Kaiser also manufactured and sold aluminum culvert pipe to end-users in competition with independent fabricators such as Columbia. Pet. App. A7.

[1] Culvert pipe is used principally in constructing housing developments and highways. It provides an underground channel to carry off water drained from streets and other surfaces. Pet. App. A129.

[2] Aluminum in corrugated sheet form also may be used in producing culvert pipe (C.A. App. 821a-822a); we will refer only to coil because Columbia purchased only aluminum coil during the period relevant to this litigation.

From 1962 until 1971, Columbia purchased aluminum coil exclusively from Kaiser. In 1971, however, Columbia purchased some aluminum coil from Reynolds Aluminum Co., one of Kaiser's competitors. The circumstances surrounding Columbia's decision to purchase coil from Reynolds rather than Kaiser—and Kaiser's reaction to that decision—are subject to dispute,[3] but it is clear that Columbia ceased purchasing aluminum coil from Kaiser in 1971. Pet. App. A7, A36, A120.

Columbia had been one of the largest independent producers of aluminum culvert pipe (C.A. App. 136a), and the record indicates that Kaiser officials at one point told Columbia that if Columbia "had one pound of metal in [its] plant other than Kaiser's," Kaiser would "stop selling [to Columbia] entirely" (C.A. App. 177a). Another Kaiser official, Holmes Collins, warned that if Columbia purchased aluminum from Kaiser's competitors, Kaiser might open a fabrication plant "across the street" from or "next door" to Columbia's fabrication plant (C.A. App. 1286a-1287a). In 1973—after Columbia ceased purchasing aluminum from Kaiser—Kaiser opened a culvert fabrication plant approximately 40 miles away from Columbia's plant and hired Robert Kennedy, a Columbia salesperson, to serve as its independent distributor in Columbia's marketing area (C.A. App. 179a-180a).

In early 1974, the price of the aluminum coil used to manufacture culvert pipe rose sharply. (C.A. App. 277a). As the price of aluminum coil increased, the margin narrowed between Columbia's cost for aluminum coil and the price it received for finished pipe; Columbia found it increasingly difficult to make a profit. In 1975, Columbia for all practical purposes ceased production of culvert pipe. Pet. App. A7.

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[3] Kaiser claims that it "never refused to fill a Columbia order" and that "there is no jury finding that Kaiser refused to deal" (Reply Br. 7 n.5). On the other hand, the court of appeals concluded in both of its decisions in this case that the evidence was sufficient to support a finding that Kaiser's policy was to refuse to deal with Columbia unless Columbia purchased all of its aluminum from Kaiser. See Pet. App. A13, A120 n.1.

2. Columbia filed suit against Kaiser in 1974, alleging violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2) and Section 3 of the Clayton Act (15 U.S.C. 14).[4] Columbia claimed that Kaiser had engaged in a course of conduct designed to maintain its monopoly power in the aluminum culvert pipe market by driving Columbia out of business (Pet. App. A120-A121).

The district court granted Kaiser's motion for a directed verdict at the close of Columbia's presentation of its case to the jury. The court found that the relevant product market could only be defined so as to include both aluminum and steel culvert pipe and that Kaiser's share of that market was too small to support a finding of monopolization under Section 2. The court also concluded that Columbia's evidence was insufficient to support its claims under Section 1 of the Sherman Act and Section 3 of the Clayton Act. Pet. App. A121-A122.

The court of appeals reversed in part, affirmed in part, and remanded the case for a new trial (Pet. App. A117-A150). It rejected the district court's conclusion regarding the relevant market, holding that the evidence permitted the jury to find that aluminum culvert pipe constituted a separate product market (*id.* at A129-A133). The court of appeals further found that there was sufficient evidence to allow the jury to find "that [Kaiser] intended specifically to punish Columbia for buying from Reynolds. And given the formerly close relations between [Kaiser] and Columbia, the jury might well have inferred that [Kaiser] knew of the drastic impact its maneuvers would have on Columbia's prospects for survival" (*id.* at A136). The court cited evidence concerning the threats directed against Columbia by Kaiser officials, Kaiser's decisions to locate a new culvert plant near Columbia's plant and assist Kennedy—Columbia's former salesman—in establishing himself as a competitor of Columbia, and Kaiser's ability to price its culvert pipe so as to disadvantage independent fabricators such as Columbia (*id.* at A134-A135). The court therefore remanded the case for a new trial.[5] This Court denied Kaiser's petition for a writ of certiorari (439 U.S. 876 (1978)).

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[4] A claim under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a), apparently was abandoned before trial.

[5] The court of appeals also concluded that there was sufficient evidence of a conspiracy between Kaiser and its subsidiary to permit the jury to consider

The case was retried in 1979. Columbia again contended that Kaiser possessed a monopoly over aluminum culvert pipe in the relevant geographic market and that Kaiser's conduct violated Sections 1 and 2 of the Sherman Act. Columbia introduced evidence that Kaiser sought to control Columbia's growth (C.A. App. 168a-169a) and threatened to retaliate against Columbia (C.A. App. 177a) and another independent culvert pipe fabricator (C.A. App. 748a, 759a-761a) for purchasing aluminum from Kaiser's competitors. Columbia contended that Kaiser acted upon this threat and attempted to preserve its monopoly over aluminum culvert pipe by appointing Kennedy as an independent distributor and establishing a culvert plant in Columbia's marketing area (Pet. App. A13).

Columbia also claimed that Kaiser manipulated the prices of aluminum coil and finished pipe so as to subject Columbia to a "price squeeze." Kaiser did not sell aluminum coil to Columbia during the period of the alleged "squeeze"; Columbia's theory was that Kaiser's competitors followed Kaiser's lead in increasing the price of coil and, as a result, Columbia was "squeezed" as effectively as if it had purchased its aluminum directly from Kaiser. Pet. App. A36, A43. Columbia presented expert testimony that Kaiser may have exercised price leadership in the aluminum industry (C.A. App. 570a-650a).[6]

Columbia's Section 1 claim (Pet. App. A136-A144); it affirmed the directed verdict with respect to the Section 1 claim asserted against Kennedy, holding that there was insufficient evidence that Kennedy joined Kaiser in a conspiracy violative of Section 1 (Pet. App. A144-A146). Finally, the court of appeals agreed with the district court that Columbia had not presented sufficient evidence that Kaiser had imposed an exclusive dealing arrangement violating Section 3 of the Clayton Act. The court of appeals concluded that the district court properly entered a directed verdict because of Columbia's "failure * * * adequately to prove that aluminum coil and sheet used in culvert fabrication was a 'line of commerce' within the meaning of the Clayton Act" (Pet. App. A147). It stated that Columbia had not presented sufficient evidence to demonstrate whether aluminum "sold to culvert manufacturers, or some much larger market constituted the relevant line of commerce" (*ibid.*).

[6] Columbia's expert economic witness, Professor Oliver Williamson, testified that the aluminum industry was oligopolistic and that parallel pricing and "price leadership" were common in oligopolistic industries (C.A. App. 597a-601a). Williamson also testified that although Kaiser was not the leading manufacturer of aluminum, the other major manufacturers might well follow

The jury rendered a special verdict, finding that Kaiser had violated both Sections 1 and 2 of the Sherman Act. It awarded damages totaling $5,445,000 after trebling. Pet. App. A35-A36, A67-A71. The district court denied Kaiser's motion for judgment notwithstanding the verdict, but ordered a retrial limited to the issue of damages (Pet. App. A33-A66). The court upheld the jury's finding of an aluminum culvert pipe product market, noting that the record contained the evidence that the court of appeals previously had identified as sufficient to support this market definition (*id.* at A39-A41). The court also found sufficient evidence in the record to support the jury's conclusion that Kaiser's conduct violated Section 2. It noted that the evidence showed that Kaiser implemented its threat to locate a culvert plant in close proximity to Columbia's plant, supported the business started by Columbia's former salesman, and priced its aluminum culvert pipe in a manner that undercut Columbia's prices for the same product. Pet. App. A43-A44.[7]

The district court also upheld the jury's determination that the antitrust violations caused Columbia's damages, but concluded that Columbia had not adduced sufficient evidence to support the damages award itself. The court therefore ordered a new trial limited to the damages issue. Pet. App. A44-A66.

The retrial resulted in a damages award of $9,567,939 after trebling, and Kaiser again moved for judgment notwithstanding the verdict. The district court denied the motion, but held that Columbia was not entitled to recover damages for loss of its "going concern value." The court accordingly reduced the judgment to $4,651,560. Pet. App. A74-A116.

3. The court of appeals upheld the jury's determination regarding liability and reinstated the damages award entered in the limited retrial (Pet. App. A5-A29). At the outset, the court

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Kaiser's pricing decisions with respect to aluminum coil used for culvert pipe because Kaiser was the leading producer of that particular form of aluminum (C.A. App. 600a-601a, 624a-625a). Williamson stated that, in his view, "Columbia was subject to a squeeze and * * * the actions that were initiated by Kaiser were fundamentally responsible" for the squeeze (C.A. App. 622a).

[7] The district court also concluded that the evidence was sufficient to support the jury's determination that Kaiser and its subsidiary engaged in a conspiracy in violation of Section 1 of the Sherman Act (Pet. App. A41-A42).

rejected Columbia's contention that its prior decision foreclosed Kaiser's challenge to the sufficiency of the evidence supporting the monopolization claim, noting that there were "material differences in the evidence presented at the two trials" (*id.* at A12). The court of appeals then considered whether the record contained sufficient evidence that Kaiser's conduct constituted the willful acquisition or maintenance of monopoly power in violation of Section 2.[8] The court concluded that, viewed in the light most favorable to Columbia, the evidence was sufficient to show that Kaiser had "attempted to control its competition" by requiring Columbia and other "independent fabricators * * * to purchase all of their raw materials from Kaiser," and that to the extent Kaiser was unable to control the competition, Kaiser "tried to destroy it" (Pet. App. A13 (footnote omitted)).

With respect to Kaiser's efforts "to control its competition" the court noted that both respondent Bonjorno and another independent aluminum culvert pipe fabricator testified that Kaiser tried to coerce their companies into purchasing aluminum coil exclusively from Kaiser. Moreover, the court of appeals observed, a Kaiser official had stated that if Columbia purchased aluminum from Kaiser's competitors, Kaiser might "open a pipe fabrication plant 'across the street' from Columbia"; the court noted that Kaiser in fact "carried through with its threats by locating a pipe plant only 40 miles from Columbia's and by refusing to sell any more coil to Columbia." Pet. App. A13. The court of appeals also cited "evidence that [a Kaiser official] told Columbia[] * * * that Kaiser would control Columbia's growth and market," and that Kaiser made "veiled threats" to a competing seller of aluminum coil, warning the seller that it could not " 'sit back and enjoy a participation in this market by merely being a supplier of coil sheet to independent pipe fabricators' " such as Columbia (*id.* at A13 & n.2). The court concluded that "[.]rom this evidence, a jury could infer that Kaiser wanted to control the source of the raw materials for the independent fabricators and thus, indirectly, wanted to control the price of independents' finished pipe" (*id.* at A13).

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[8] Kaiser did not dispute that it had monopoly power in the aluminum culvert pipe market (Pet. App. A7, A12 n.1).

Turning to evidence demonstrating Kaiser's efforts to "destroy" Columbia, the court of appeals first considered Columbia's argument that Kaiser engaged in a "price squeeze" by "deliberately rais[ing] the price of the raw materials to the same level as the price that it charged for the finished pipe, thus making it impossible for Columbia to operate at a profit if it sold pipe competitively with Kaiser" (Pet. App. A14). The court observed that "[t]he mere existence * * * of a 'price squeeze' is not necessarily an antitrust violation," and that Columbia was required to "present evidence that [Kaiser] deliberately produced the effect" and that the " 'squeeze' was not the result of natural market forces such as supply and demand or legitimate competition" (*ibid.*).

The court found that Columbia had "produced evidence that Kaiser controlled both the price of the raw material"—the aluminum coil—and "the price of the finished [aluminum culvert] pipe" (Pet. App. A14). In light of the fact that Kaiser had an 80% share of the aluminum culvert pipe market, Kaiser's control over the price of pipe was not contested (*id.* at A14-A15).[9]

The court viewed Columbia's evidence with respect to Kaiser's ability to control the price of the raw material as "more problematic" (Pet. App. A15). It first noted that Kaiser "produced over 80% of the aluminum used for making pipe," but that Kaiser contended it was not the dominant manufacturer and therefore did not control the price of the raw material (*ibid.*). The court observed that Columbia's theory was "that Kaiser was a price leader, and that Reynolds and Alcoa, the other major aluminum producers, usually followed Kaiser's pricing strategy. Thus, Kaiser's prices would determine the market prices" (*ibid.*). The court found the opinion of Columbia's expert witness that Kaiser was a "price leader" with respect to aluminum coil "well supported by the evidence" (*id.* at A17). It noted that "[i]f there

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[9] Kaiser did not contest the jury's finding that the aluminum culvert pipe market constituted the relevant product market (Pet. App. A12 n.1). Kaiser produced approximately 80% of the aluminum culvert pipe sold in the stipulated geographic market (*id.* at A7).

were price leadership, it would be most likely that Kaiser set the pricing policies [in coil] because of its extensive expertise and investment * * * in the area" (*id.* at A16). The court concluded that there was sufficient evidence regarding Kaiser's control over coil prices to submit the issue to the jury (*id.* at A17).

The court next considered whether the evidence showed that "Kaiser deliberately manipulated the coil and pipe prices to create a squeeze" (Pet. App. A17). It concluded that "[t]here was evidence that the squeeze was not caused by natural market forces" (*ibid.*), because the evidence supported an inference that Kaiser's price changes were made for "strategic" reasons and showed that the "price of pipe was often below the price of the coil" in 1974 (*id.* at A18). The court held that the record contained "sufficient evidence for the jury to conclude that Kaiser not only possessed the power to create the price squeeze, but that it exercised that power to destroy its competition" (*id.* at A18-A19).

The court of appeals also found that "Kaiser sought to destroy Columbia by setting up Robert Kennedy as a distributor" (Pet. App. A19). The evidence indicated that Kaiser's own credit department had at one point "concluded that Kennedy's operation was an 'unacceptable credit risk,' " and the court reasoned that the "jury could infer that by going against the very strong recommendation of its credit department, Kaiser displayed its intent to drive Columbia out of business" (*ibid.*). The court concluded that "[g]iven the evidence of Kaiser's anticompetitive behavior * * * there was sufficient evidence to permit the monopolization claim to go to the jury" (*id.* at A20 (footnote omitted)).[10]

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[10] The court of appeals stated that there was no need to consider whether this Court's decision in *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), precluded a finding that Kaiser and its wholly-owned subsidiary engaged in a conspiracy violative of Section 1, because "the damage award may be sustained solely on the separate section two verdicts that do not depend on a theory of intra-enterprise conspiracy" (Pet. App. A9). The court rejected Kaiser's challenge to the damages award based upon alleged contradictions between Columbia's evidence at the liability trial and its evidence at the damages trial (*id.* at A20-A23), Kaiser's contention that the district court erred by ordering a retrial limited to the damages issue (*id.* at A23-A24), and Kaiser's arguments concerning the conduct of the damages trial and the

DISCUSSION

The court of appeals' analysis of the "price squeeze" issue—the only aspect of the decision below challenged by petitioners—is troubling. The court of appeals correctly recognized that a defendant can implement a price squeeze violative of the antitrust laws only if he controls price in the relevant raw material market. The court erred, however, in concluding that the jury could find that Kaiser exerted the requisite control over aluminum coil prices on the basis of evidence that Kaiser was a "price leader" with respect to the price of aluminum coil.

Despite the error in this aspect of the decision below, we do not believe that review by this Court is warranted. Cases in which an antitrust plaintiff relies upon the existence of a price squeeze to establish liability under Section 2 are relatively rare, and we think it unlikely that any other court of appeals would adopt the view of price leadership evidence set forth in the opinion below. Contrary to petitioners' contention, the court of appeals did not announce a rule of law rejecting the precedent that requires a showing of market power in the raw material market in price squeeze cases. Thus, the case turns on the sufficiency of the evidence to support the jury's verdict. Reversal would require not only a holding that the price leadership evidence cannot support a finding that Kaiser controlled price, but also a determination that none of the conduct independent of the price squeeze on which the court of appeals relied could support the verdict. While the latter question is discussed in the petition (Pet. 26 n.22) and in petitioners' reply brief, it is at least doubtful whether it is "fairly included" in the petition's questions presented for purposes of this Court's Rule 21.1(a). In these circumstances, we are unable to conclude that the price leadership issue presented in this case is of sufficient importance to warrant this Court's review.

1. A "price squeeze" occurs, as an economic matter, when the margin between the cost of raw materials used in a product and the market price of that product is less than the cost of pro-

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evidence relating to the damages award (*id.* at A24-A26). Finally, the court of appeals found that the district court erred by setting aside the portion of the damages award premised on Columbia's going concern value; the court of appeals reinstated the jury's award of damages (*id.* at A26-A29).

ducing and marketing the product. The manufacturer of the finished product is subject to a "squeeze" because the price of the finished product does not permit the recovery of raw material, production, and marketing costs. Price squeezes are frequent occurrences and generally do not reflect either anticompetitive conduct or market failure. For example, a price squeeze often may be the result of a change in the relationship between prices in the raw material market and prices in the finished product market that is attributable to differences in the forces of supply and demand operating in the two markets. See, *e.g.*, 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 728c1, at 232 (1978).

Questions regarding the significance of a price squeeze under the antitrust laws arise in situations in which a vertically integrated company producing a finished product also sells raw materials to independent manufacturers that produce the same finished product. If the vertically integrated company can control the market price for the raw material, it will have the power to implement a price squeeze. Thus, a "monopolist of copper ingot can squeeze independent pipe fabricators by raising his ingot price while refusing to raise his pipe price, or by lowering his pipe price while maintaining his ingot price" (3 P. Areeda & D. Turner, *supra*, ¶ 728c, at 231). Of course, the fact that such a monopolist has the power to implement a price squeeze does not mean that every price squeeze that occurs in such a market is the result of anticompetitive conduct by the monopolist. For example, as we discuss below (see pages 11-12), a reduction in the pipe price could simply reflect the monopolist's decision to engage in lawful competition in the pipe market.

A well known case regarding the treatment of price squeezes under the antitrust laws is *United States* v. *Aluminum Co. of America* (*Alcoa*), 148 F.2d 416 (2d Cir. 1945). The defendant in *Alcoa* possessed monopoly power over aluminum ingot, the raw material used to fabricate a finished product—aluminum sheet—that the defendant sold in competition with independent fabricators. The government claimed that the defendant "consistently sold ingot at so high a price that the 'sheet rollers' [the independent fabricators], who were forced to buy from it, could

not pay the expenses of 'rolling' the 'sheet' and make a living profit out of the price at which [the defendant] itself sold 'sheet' " (148 F.2d at 437).

The court determined that the fact that the defendant reduced its price for ingot after the government commenced an investigation into complaints by independent aluminum sheet manufacturers established a "prima facie case that [the defendant] had been holding ingot at a price higher than a 'fair price,' and had reduced the price only because of pressure" (148 F.2d at 437). The court concluded that it was "unlawful" for the defendant "to set the price of 'sheet' so low and hold the price of ingot so high" (*id.* at 438) because the result of the defendant's conduct was that "there was * * * little or no inducement [for independent fabricators] to continue in the 'sheet' business" (*id.* at 437). The court acknowledged that the price squeeze "was only a consequence" of the defendant's "control over the price of ingot" and therefore "perhaps * * * ought not to be considered as a separate wrong" (*id.* at 438).[11] Nevertheless, the court concluded that the squeeze did constitute an unlawful exercise of the defendant's monopoly power in the raw material market (*ibid.*).

The implicit assumption underlying this aspect of *Alcoa*—that a monopolist has a duty to set its prices in a manner that avoids injuring competitors—is fundamentally inconsistent with the principle that the antitrust laws "were enacted for the protection of *competition,* not *competitors*" (*Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 488 (1977) (emphasis in original)). Courts and commentators accordingly have rejected the view that the antitrust laws limit a monopolist's ability to utilize otherwise lawful methods of competition, such as above-cost price cuts. See *California Computer Products* v. *International Business Machines Corp.,* 613 F.2d 727, 744 (9th Cir. 1979); *Berkey Photo, Inc.* v. *Eastman Kodak Co.,* 603 F.2d 263, 281 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1981) ("a monopolist is permitted, and indeed encouraged, by § 2 to compete aggressively on the merits"); M. Handler, *Reforming The Antitrust Laws* 92 (1982) (footnote omitted) ("[A] monopolist is not to be shackled in his competition[.] * * * This is the doctrine

[11] Indeed, the court specifically stated that the squeeze formed no part of "the reasoning by which [it] conclude[d] that the monopoly was unlawful" (148 F.2d at 438).

which the various courts of appeals in the 1970's have enunciated, discarding the contrary implications of *Alcoa*"); 3 P. Areeda & D. Turner, *supra*, ¶ 729c, at 235-238.[12]

The *Alcoa* price squeeze discussion in inconsistent with this basic principle of modern-day antitrust analysis because the court failed to consider the fact that a price squeeze generally is not the result of anticompetitive conduct. As we have discussed, price squeezes typically are caused by differences in supply and demand in the raw material and finished product markets. A squeeze also might occur because the vertically integrated firm is more efficient in producing the finished product and therefore incurs production and marketing costs that are lower than the costs of its independent competitors. Of course, "[a]ny 'squeeze' resulting from these causes is desirable, involving a shift in bu[s]iness from less to more efficient operations." R. Bork, *The Antitrust Paradox* 243 (1978); see also H. Hovenkamp, *Economics and Federal Antitrust Law* § 5.6, at 149-150 (1985); R. Posner & F. Easterbook, *Antitrust Cases, Economic Notes, and Other Materials* 874-875 (2d ed. 1981); 3 P. Areeda & D. Turner, *supra*, ¶¶ 728cl-728c3, 729c, at 232-233, 235-238.

2. A plaintiff attempting to prove that a defendant implemented an unlawful price squeeze plainly must demonstrate that the defendant possessed monopoly power in the relevant raw material market. A defendant that lacked power over the price of the raw material would have no control over one end

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[12] The *Alcoa* court's reasoning that a monopolist must charge a "fair" price also has been rejected. See, *e.g.*, *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d at 294 ("unless the monopoly has bolstered its power by wrongful actions, it will not be required to pay damages merely because its prices may later be found excessive. Setting a high price may be a use of monopoly power, but it is not in itself anticompetitive"); 3 P. Areeda & D. Turner, *supra*, ¶ 729c, at 237 (*Alcoa*'s price squeeze holding runs counter to the principle that "a lawful monopolist is entitled to charge a monopoly price"); L. Sullivan, *Handbook of the Law of Antitrust* § 47, at 118 (1977) ("[t]he reasonable price standard is intrinsically vague and difficult"). Indeed, the monopolist's decision to maintain prices at high levels may have the desirable effect of encouraging entry into the monopolized market. *Berkey Photo, Inc.*, 603 F.2d at 294.

of the "squeeze" and, therefore, could not be held responsible for any diminution in the margin between the raw material cost and the market price for the finished product. See *City of Kirkwood* v. *Union Electric Co.*, 671 F.2d 1173, 1176 n.4 (8th Cir. 1982) (price squeeze occurs when a "vertically integrated company which has monopoly power at the wholesale level but faces competition at the retail level sets its wholesale rates so high that its wholesale customers will be unable to compete with it in the retail market"); *Berkey Photo, Inc.*, v. *Eastman Kodak Co.*, 603 F.2d at 276 ("whatever problems of murkiness may plague the *Alcoa* opinion, on this point it it pellucid. The defendant had employed its monopoly power in the ingot market to impose a price squeeze").[13]

Indeed, when the defendant lacks power over price in the raw material market, its market power in the finished product or "downstream" market is irrelevant. If the defendant used its downstream market power to raise prices, any pressure on competitors would be lessened or eliminated. Of course, if the defendant chose to reduce its prices in the downstream market, competitors' profits might suffer. But a monopolist's competitive, above-cost pricing is not an abuse of monopoly power, even if such pricing disadvantages less efficient rivals. See, *e.g.*, *Northeastern Telephone Co.* v. *American Telephone & Telegraph Co.*, 651 F.2d 76, 86-87 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982); *Telex Corp.* v. *International Business Machines Corp.*, 510 F.2d 894, 926 (10th Cir.), cert. dismissed, 423 U.S. 802 (1975). Thus, proof that the defendant possessed power over price in the raw material or "upstream" market is an indispensable element in establishing that the defendant engaged in a price squeeze unlawful under Section 2.

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[13] Price squeeze issues frequently have arisen in cases where a regulated entity, generally an electrical utility, seeks relief from "excessive" wholesale rates in order to compete on an equal footing at a retail level. This Court held in *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976), that federal regulators may remedy such squeezes by " 'put[ting] wholesale rates in the lower range of the zone of reasonableness' " (426 U.S. at 279 (citation omitted)). *Conway* concerned the authority of the Federal Power Commission to order relief under the Federal Power Act, not Section 2 of the Sherman Act.

a. Kaiser contends (Pet. 17-18) that this case warrants review because the court of appeals imposed liability for the price squeeze without finding that Kaiser possessed monopoly power in a defined raw material market. Although the court of appeals' discussion of this issue is not completely clear, we do not believe that the court of appeals dispensed with that requirement.

Monopoly power, of course, is "the power to control prices or exclude competition." *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (footnote omitted); see also *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966). The district court in this case instructed the jury that, in order to establish that the price squeeze violated Section 2, "[Columbia] would have to show by the evidence that the Kaiser defendants were *dominant* or had *sufficient power in the raw material market to control the price of the coil or to exclude competitors*" (C.A. App. 3949a (emphasis added)). Thus, the jury was required to find that Kaiser exercised power over price in the relevant market before holding Kaiser liable for the price squeeze.

The court of appeals expressly stated that "[t]he mere existence * * * of a 'price squeeze' is not necessarily an antitrust violation. The plaintiff must present evidence that the defendants deliberately produced the effect * * * [so that] the jury [may] conclude that the 'squeeze' was not the result of natural market forces such as supply and demand or legitimate competition" (Pet. App. A14). And the court concluded that the evidence introduced by Columbia showed that "Kaiser controlled * * * the price of the raw material." *Ibid.*; see also *id.* at A15. Thus, the court recognized that Columbia had the burden of demonstrating that Kaiser exercised the requisite degree of control over raw material prices.

b. The court of appeals stated that evidence that Kaiser was the "price leader" in the market for aluminum coil was sufficient to establish Kaiser's power over the price of aluminum coil (see Pet. App. A15-A17). In our view, the court of appeals erred by concluding that the jury reasonably could have relied upon this evidence to find that Kaiser controlled prices in the raw material market.

Price leadership is a common phenomenon, particularly in basic industries, such as aluminum and steel, that rest upon an undifferentiated commodity and may be characterized as oligopolistic. See, *e.g.*, A. Thompson, *Economics Of The Firm* 394-398 (4th ed. 1985); K. Cohen & R. Cyert, *Theory of the Firm: Resource Allocation In A Market Economy* 241-249 (1965). Competitors in such industries sometimes follow the price increases of a "leader," with the result that pricing changes within the industry are fairly uniform. See 4 P. Areeda, *Antitrust Law* ¶¶ 1410b, 1432 (1986). It is possible that a firm exercising price leadership in a raw material market might be able to impose a price squeeze upon a competitor in a related finished product market, even where the price leader did not sell the raw material to the downstream competitor. However, such a strategy is not likely to be successful and, therefore, is not likely to be pursued in practice.

A monopolist engaging in a price squeeze generally must bear the cost of lost sales in the raw material market resulting from the high above-market raw material prices that are necessary to implement the squeeze. In the price leadership context, a price squeeze strategy could succeed only if the price leader's competitors in the raw material market also were willing to forgo sales by adhering to the price leader's prices. It is more likely that such firms would choose to sell the raw material to the target of the squeeze and others at a lower price, as Kaiser's competitors in fact did in this case (see C.A. App. 155a-156a, 185a, 241a). Thus, where firms selling to the target of the price squeeze are in a position to profit by charging a lower price and expanding sales, evidence of price leadership is insufficient to show that the defendant controlled the price at which the raw material was sold by other firms in that market. See *Dimmitt Agri Industries, Inc.* v. *CPC International, Inc.*, 679 F.2d 516, 530-531 (5th Cir. 1982) (rejecting contention that evidence establishing that an industry is "an oligopoly, with [the defendant] as its price leader" suffices to establish Section 2 liability); cf. *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, No. 83-2004 (Mar. 26, 1986), slip op. 12.

This conclusion is supported by the settled rule that parallel price movements by competitors are not by themselves evidence sufficient to establish a price-fixing agreement in violation of Section 1 of the Sherman Act. *Theatre Enterprises, Inc.* v. *Para-*

mount Film Distributing Co., 346 U.S. 537, 541 (1954); 4 P. Areeda, *supra*, ¶ 1432. If price leadership and parallel price movements are not sufficient to show an agreement under Section 1, the same evidence should not be sufficient to demonstrate that Kaiser had the ability to force its competitors to follow its prices. Price leadership evidence does not tend to exclude the substantial possibility that horizontal competitors have made purely independent pricing decisions. Cf. *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984) (evidence that tends to exclude the possibility of independent action by the manufacturer and distributor must be adduced in resale price maintenance cases). We submit that where, as here, firms selling to the target are in a position to profit from the situation by charging a lower price and expanding sales, imposing liability on a firm that did not sell raw material to the target of the squeeze would be appropriate only if sellers of the raw material had entered into an agreement with respect to price.

The court of appeals did not find any evidence of a horizontal price-fixing agreement in this case. It simply emphasized that Kaiser, as the largest producer of aluminum coil for use in culvert pipe, had "the largest interest in pipe prices" (Pet. App. A16), and that competing sellers customarily followed Kaiser's prices (*ibid.*).[14] The court of appeals erred by concluding that this price leadership evidence demonstrated the control over raw material price needed to establish a price squeeze.[15]

3. Despite the court of appeals' misplaced reliance on the price leadership evidence, we are unable to conclude that review by the Court is warranted in this case. Questions regarding price squeezes do not arise with any frequency under the antitrust laws because a defendant rarely possesses sufficient market power in both the raw material and finished product markets to

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[14] Kaiser claims that competitors did not follow its prices (Pet. 25-26).

[15] Respondents contend (Br. in Opp. 12) that "the record establishes that [Kaiser] did in fact have dominant and monopolistic power in coil," an apparent reference to evidence that Kaiser "produced over 80% of the aluminum used for making pipe" (Pet. App. A15). Kaiser argues (Pet. 24-25) that the product market should not be limited to aluminum coil used in culvert fabrication, and that its share of the proper market is significantly lower. The court of appeals did not address the significance of this evidence in discussing whether Kaiser exercised power over the price of aluminum coil.

support a credible claim that it controlled prices in both markets. For that reason alone, the questions presented do not appear to be of sufficient importance to warrant review by this Court. In addition, we are aware of no other price squeeze case in which a court has relied upon price leadership evidence to find that the defendant controlled prices in the relevant market. We doubt that other courts of appeals will adopt the reasoning of the court below because of the obvious shortcomings of price leadership evidence as proof of power over price.

Moreover, review by this Court is not necessary because the question whether price leadership evidence is sufficient to demonstrate control over price appears not to have been dispositive in this case. The court of appeals' opinion suggests that the court apparently viewed evidence independent of the price squeeze as providing sufficient grounds for upholding the jury's verdict on the Section 2 claim; the court expressly concluded that this evidence showed that Kaiser "attempted to control its competition, and failing that, tried to destroy it" (Pet. App. A13). Thus, the court found that Kaiser had (1) told "Columbia's owners that Kaiser would control Columbia's growth and market"; (2) "attempted to coerce" Columbia and another independent fabricator "into purchasing only from Kaiser"; (3) threatened to "open a pipe fabrication plant 'across the street' from Columbia"; and (4) "carried through with [this] threat" when it opened a plant forty miles from Columbia's factory (*ibid.*). The court of appeals concluded that this evidence—which is wholly unrelated to the price squeeze claim—permitted "a jury [to] legitimately infer that Kaiser attempted to control its competition." *Ibid.*; see also *id.* at A105 (district court decision).

Whether the evidence was legally sufficient to support such a finding by the jury is not, in our view, an issue fairly comprised in the questions presented in the petition for certiorari (although, as we have explained, that issue is discussed in the petition and reply brief). Were the Court to conclude that the question is presented, however, we would have grave doubts

that the evidence suffices to sustain a verdict under Section 2 because Kaiser's conduct may well be characterized as no more than aggressive competition.[16]

Nor do we believe that Kaiser has shown any persuasive ground for believing that a decision by this Court on the price squeeze issue would affect the outcome of the case. Kaiser asserts (Reply Br. 8-10) that because the price squeeze issue figured prominently at trial and in the court of appeals' decision, the decision below must be reversed if the evidence relating to the price squeeze claim is found to be insufficient as a matter of law. But antitrust plaintiffs are not required to "compartmentalize" their proof (*Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)). And each and every allegation of anticompetitive conduct need not be proven in order to establish Sherman Act liability. Cf. *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, No. 84-510 (June 19, 1985), slip op. 13. In *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), upon which Kaiser relies (Reply Br. 9-10), the Court found that a new trial was required

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[16] In our view, Kaiser's conduct is most reasonably understood in light of its interest in increasing its sales of aluminum, which led it to develop and promote new uses for aluminum. Thus, Kaiser invested substantial resources in developing a market for aluminum culvert pipe as a substitute for steel and concrete (C.A. App. 57a-59a, 73a-74a). Selling aluminum culvert pipe directly to users and selling coil to independent fabricators of culvert pipe both serve the lawful goal of maximizing sales of aluminum. Kaiser apparently concluded that selling through Columbia was an efficient means of serving a particular area of the country, as long as Columbia was willing to purchase all of its coil from Kaiser. When Columbia instead turned to Kaiser's competitors for coil, however, Kaiser had to locate a fabricating plant in Columbia's area or risk losing sales, because the cost of transporting finished pipe from a distant plant is substantial (C.A. App. 794a). Viewed from that perspective, Kaiser's decision to locate a fabrication plant in Columbia's marketing area was a rational and, on its face, procompetitive response to its loss of Columbia as a coil customer. Further, we see nothing anticompetitive in Kaiser's decision to appoint Kennedy as an independent distributor. It is undisputed that Kennedy was dissatisfied with his compensation from Columbia, and that he was told that he was free to seek employment elsewhere. Kaiser's decision to appoint Kennedy as a distributor thus served both Kennedy's and Kaiser's interests. Finally, the statements of the Kaiser official cited by the court of appeals can plausibly be viewed merely as the sort of posturing one might expect from an aggressive salesman.

because "one theory of liability" was found to be erroneous (370 U.S. at 29). Here, by contrast, Columbia has presented only a single theory of liability—that Kaiser violated Section 2 by seeking to drive Columbia out of business—supported by a variety of evidence, including the evidence relating to the price squeeze. A determination that the price squeeze evidence cannot support Columbia's theory of liability does not render the other evidence insufficient to support the jury's verdict.

Kaiser also argues (Reply Br. 9-10) that a new trial regarding damages would be necessary if this Court found that the record did not contain sufficient evidence to support the price squeeze claim. However, the court of appeals concluded (Pet. App. A23-A24) that on the facts of this case

> it would be extremely difficult, if not impossible, to segregate and attribute a fixed amount of damages to any one act. [Respondents'] basic injury was that Columbia was driven out of business. Further, the theory of the section two violation here is not that any one act in itself is unlawful, but that all the acts taken together show the willful acquisition or maintenance of a monopoly which damaged and forced Columbia out of business.

The court therefore concluded that the district court did not err by ordering a second trial limited to the issue of damages because "[w]hen the antitrust injury is of an indivisible nature, * * * the issues in the liability trial are not so interwoven with the issues in the damages trial as to require a retrial of both" (*id.* at A24). This reasoning suggests that a new damages trial would not be required if the price squeeze claim were eliminated as a basis for the jury's finding of liability. See also Pet. App. A81 (district court decision).

Finally, we note that the 1979 trial was bifurcated; the jury rendered its special verdict regarding liability, heard the evidence regarding damages, and then rendered its special verdict regarding damages (Pet. App. A35, A67-A71). The interrogatories submitted to the jury, which were the result of an agreement between Kaiser and Columbia, did not request the jury to specify the facts that formed the basis of its determination regarding the Section 2 claim (Pet. App. A67-A69, A80-A81, A105). The uncertainty regarding the liability jury's

determination thus stems from the generalized nature of the special verdict form agreed to by Kaiser. In these circumstances, we do not agree that a third trial necessarily would be required if this Court were to reject the court of appeals' price squeeze analysis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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